CHUNG KHIAW BANK LTD. v. UNITED OVERSEAS BANK LTD.

[P.C. (Lord Hodson, Lord Donovan & Lord Wilberforce) January 19, 1970]

[Privy Council Appeal No. 31 of 1968]

Registration of Deeds — Priority — Appellants equitable mortgagees by deposit of title deeds — Respondents unsecured judgment creditors — Respondents attaching interest in immovable property and registering order in Registry of Deeds — Appellants subsequently obtaining an order declaring them as mortgagees — Who has priority? — Order of attachment — Whether "assurance for valuable consideration" within the meaning of the Registration of Deeds Ordinance (Cap. 255), ss. 2, 7 and 15 — R.S.C. 1934 O. XLI.

Land Laws — Equitable mortgage — Prior registration — Priority in proceeds of sale.

The appellants were equitable mortgagees by deposit of title deeds of land, belonging to a debtor acknowledged by two instruments in writing dated August 25, 1958. On June 16, 1966 the respondents obtained judgment against the debtor and on October 27, 1966 by a writ of seizure and sale they obtained an order attaching the debtor's interest in the property. This order was registered in the Registry of Deeds at Singapore on October 28, 1966. Subsequently on November 14, 1966 the appellants obtained an order against the debtor that the appellants were by reason of the deposit of the title deeds legal mortgagees of the properties and giving the appellants liberty to sell them out of court. This order was registered in the Registry of Deeds on January 23, 1967. The respondents thereupon applied to have this order set aside. The application was dismissed in the High Court ([1968] 1 M.L.J. 291) but on appeal to the Federal Court ([1968] 2 M.L.J. 85) it was ordered that the order of November 14, 1966 be set aside. The appellants appealed to the Privy Council.

Held, dismissing the appeal: (1) the respondents had, by reason of the earlier registration of the order of attachment, priority over the appellants;

(2) an order of attachment or of seizure and sale is an "assurance for valuable consideration" within the meaning of section 7(3) of the Registration of Deeds Ordinance.

Cases referred to:-

(1) *Whitworth* v. *Gaugain* (1844), 3 Ha. 416; 67 E.R. 444.

(2) *Eyre* v. *McDowell* (1861), 9 H.L.C. 619; 11 E.R. 871.

(3) *Jones* v. *Barker* [1909] 1 Ch. 321.

(4) *Fung Sin Wa* v. *Moi Chan Hen* (1897), 4 S.S.L.R. 175, (1898) 5 S.S.L.R. 29.

(5) *Ng Boo Bee* v. *Khaw Joo Choe & Ors.* (1916), 14 S.S.L.R. 90.

PRIVY COUNCIL appeal from Federal Court of Malaysia holden at Singapore, heard on November 25, 26 & 27, 1969.

J. E. Le Quesne, Q.C. (*A. L. Hills* with him) for the appellants.

Michael Kerr Q.C. (*G. Godfrey* and *K. S. Chung* with him) for the respondents.

Lord Wilberforce (delivering the judgment of the Board): The contest in this case is between two banks, each of which is a creditor, for a large amount of money, of one Tay Soo Tong. The appellants are equitable mortgagees by deposit of deeds, the respondents unsecured judgment creditors. The question is which of these banks is entitled to prior payment out of the proceeds of the lands in Singapore which were the subject of the appellants' equitable mortgages.

The appellants claim that their security was constituted by deposit of title deeds and documents and acknowledged by two instruments in writing dated 25th August 1958. The respondents obtained judgment against the debtor on 16th June 1966 for $378,267.31. On 27th October 1966, by a writ of seizure and sale dated 25th October 1966, they obtained an order attaching the debtor's interest in the properties. This order was registered in the Registry of Deeds at Singapore on 28th October 1966.

On 14th November 1966, by an originating summons dated 22nd September 1966, the appellants obtained an order against the debtor declaring that the appellants were, by reason of the deposit of the title deeds, legal mortgagees of the properties and giving the appellants liberty to sell them out of court. The respondents were not made parties to this originating summons. This order was registered in the Registry of Deeds at Singapore on 23rd January 1967. Correspondence followed, which led to no result, and finally the respondents, on 25th October 1967, applied by summons in chambers for an order *inter alia* that the order dated 14th November 1966 be set aside. The summons came before Winslow J. and was dealt with mainly on a procedural basis. The learned judge in fact held that the order of 14th November 1966 was not an *ex parte* order and that the respondents were not "persons affected" by the order. He dismissed the application.

The respondents appealed to the Federal Court of Malaysia (Appellate Jurisdiction). That court held, unanimously, that the order of 14th November 1966 was made *ex parte* and that the respondents were affected by it. The reason for this latter finding was that the court held that the respondents had obtained priority over the rights of the appellants in the properties by the registration of the order of attachment on 28th October 1966. The Federal Court therefore reversed the judgment of Winslow J. and ordered that the order of 14th November 1966 be set aside and that the register of deeds be rectified by cancelling the entry of 23rd January 1967.

On the appeal before the Board, none of the procedural points canvassed before the courts below were pressed: both sides addressed their arguments to the question of substance, namely whether the respondents as judgment creditors had or had not priority over the appellants as regards disposal of the proceeds of sale of the properties.

A further point was taken by the respondents as to the admissibility in evidence of the memoranda of deposit, but their Lordships did not find it necessary to hear argument on this point and express no opinion with regard to it.

The relevant provisions regarding the registration of deeds and orders in Singapore are contained in the Registration of Deeds Ordinance (Cap. 255), which dates from 1886. These are as follows:

"2. 'assurance' includes any conveyance, memorandum of charge or discharge ... [or] order of court ... 'order of court' means any judgment, decree, writ of execution or sequestration, adjudication in bankruptcy or other order or process of or

issuing from the said court or other court of competent jurisdiction whereby any interest in any land is or may be affected."

"7. (1) Where any lien or charge on any lands is claimed in respect of any unpaid purchase-money or by reason of any deposit of title deeds or otherwise, a memorandum of such lien or charge, signed by the person against whom such lien or charge is claimed, may be provisionally registered on presentation by any person claiming to be interested therein. (3) No such lien or charge shall have any effect or priority as against any assurance for valuable consideration unless and until a memorandum thereof has been registered in accordance with this Ordinance."

"15. (1) Subject to this Ordinance, all instruments ... entitled to be registered under this Ordinance shall have priority according to the date of registration thereof and not according to the date of such instruments or of the execution thereof. (4) All priorities given by this Ordinance shall have full effect in all courts except in cases of actual fraud to which the person by or on whose behalf the registration is made is a party, and all persons claiming thereunder any legal or equitable interests shall be entitled to corresponding priorities, and no such person shall lose any such priority merely in consequence of his having been affected with actual or constructive notice except in cases of actual fraud to which he is a party."

The provisions under which the respondents obtained their order for attachment are section 14 (1) of the Courts Ordinance (Cap. 3) and Order XLI of the Rules of the Supreme Court of Singapore, which contains the following provision —

"1. (1) Where the property to be seized consists of immovable property or any interest therein, seizure shall be effected by registering, under the Registration of Deeds Ordinance (Cap. 255), an order of court attaching the interest of the judgment debtor in the land described therein."

The argument for the appellants was based principally upon the terms of Order XLI. This, it was said, enabled seizure to be obtained by a judgment creditor by registering under the Registration of Deeds Ordinance an order of court "attaching the interest of the judgment debtor" in the land described in the order. This, it was contended, limited the rights of the judgment creditor to whatever interest in the lands the debtor in fact possessed, so that if, as was the case here, the debtor had charged his land in favour of a mortgagee the judgment creditor could seize no more than the debtor's rights subject to the charge. In support of this argument, the appellants referred to the English case of *Whitworth* v. *Gaugain*[1] (affirmed 1 Ph. 728) in which Wigram V.C. held that in equity an equitable mortgagee has priority over a judgment creditor who has obtained possession through a writ of elegit; to the decision of the House of Lords in *Eyre* v. *McDowell*[2] decided upon certain Irish and U.K. statutes, and to the case of *Jones* v. *Barker*.[3] This case was decided upon the Yorkshire Registries Act 1884 (47 & 48 Vict. c. 54) which was substantially similar to the Ordinance of 1886, and it was there held that a deed of assignment in favour of creditors only operated upon the interest of the judgment debtor subject to charges. These cases lend substantial support to the contention that under the general law, apart from the special provisions of legislation as to registration, and in certain circumstances even where such special provisions exist, the judgment creditor can only take whatever interest the debtor has and that, in such a case, questions of priority and correspondingly of postponement through failure to register, do not arise.

The argument for the respondents was based specifically upon the provisions of the Registration of Deeds Ordinance (Cap. 255). While not disputing that the position under the general law was as contended by the appellants, and summarised above, they submitted that the effect of the Ordinance was clear, and that by virtue of section 7 (3), combined with the definition in section 2 of "assurance" so as to include an order of the court, and of section 15, they obtained, by the registration of their judgment, priority over the unregistered equitable mortgages of the appellants. Consideration of this argument requires examination of section 7 (3), in the context of the Ordinance as a whole, and, as a subsidiary point, of the expression "any assurance for valuable consideration". The appellants disputed the application of this expression to an order of seizure and sale.

In argument before the Board, much emphasis was placed by each side upon the word "interest", both in the Registration of Deeds Ordinance, and in Order XLI of the Rules of the Supreme Court of Singapore. On the one hand it was submitted that the use of this word showed (supporting the appellants) that a judgment creditor could only seize whatever the debtor in fact had, namely, in this case, the land subject to the charges. On the other, it was argued that "interest", at any rate in the Registration of Deeds Ordinance, was used to denote what may be the subject of a conveyance or assurance, i.e., the whole estate in the land. Their Lordships do not consider that an answer to the question for decision is to be found in a choice between these alternatives: the use of the word "interest" is not, in their opinion, sufficiently consistent or precise either as between the various pieces of legislation, or within the four corners of any single enactment, to provide effective guidance. The substantial question is whether the Registration of Deeds Ordinance introduced in 1886, which was subsequent to *Whitworth* v. *Gaugain* and *Eyre* v. *McDowell*, *ubi supra*, brought about a change in the law. This question has received consideration in the courts of Singapore.

In *Fung Sin Wa* v. *Moi Chan Hen*,[4] the question referred to the court was as to the respective priorities of a registered writ of execution and unregistered equitable charges. The equitable charges were not (as is the present case) accompanied by a memorandum of deposit but it was held that this made no difference as regards the application of the Registration of Deeds Ordinance. Thus the issue was precisely the same as in the present case, and indeed the Federal Court, in the judgment under appeal, followed the earlier decision. It was held in both courts that the judgment creditor had priority. Leach J. in his judgment referred to *Whitworth* v. *Gaugain* and *Eyre* v. *McDowell*, *ubi supra*, but held that under and by virtue of the Registration of Deeds Ordinance of 1886, whose wording differed from that of the statutes construed in *Eyre* v. *McDowell*, the judgment creditor had priority. He expressly held that a writ of execution was an assurance for valuable consideration. On appeal, this judgment was upheld. Collyer Acting Chief Justice, after stating that he had had very considerable doubt, in a careful judgment proceeded to a fresh examination of *Eyre* v.

McDowell, ubi supra, and came to the conclusion that the law which he had to interpret was not the same as the law which determined that case. He stated the object of the Registration of Deeds Ordinance as "to prevent as far as possible the making of unregistered and secret assurances of every kind, by giving priority to every kind of registered assurance". He too held that a writ of execution was an "assurance for valuable consideration".

The appellants, necessarily, invited their Lordships to disagree with this decision and indeed to overrule it. But even if it stood alone, their Lordships would be reluctant to take this course. The construction placed upon the Ordinance, in particular upon section 2 (definition of assurance) and section 7 (3), appears in itself at least a reasonable construction, and if the matter were doubtful, their Lordships would be inclined to favour that construction which gave strength to a system of priority by registration furthering the policy to which Collyer A.C.J. referred. But the decision does not stand alone; indeed its roots in the legal system of Singapore have been greatly fortified in the passage of time.

In the Civil Procedure Code of 1907 there appears the following section:

"619.—(1) Where the property to be seized consists of immovable property or any interest therein, either at law or in equity, the seizure shall be made by registering, under "The Registration of Deeds Ordinance 1886", an order of court, signed by the Registrar and sealed with the seal of the court, attaching the interest of the judgment debtor in the property described in the order.

(2) the order shall be made *ex parte* by the Registrar on a written requisition by the Sheriff, and shall be deemed to be an order of court by which the property in it is affected, and an assurance for valuable consideration within the meaning of 'The Registration of Deeds Ordinance 1886'."

This section appears to be a legislative endorsement of the decision in *Fung's* case — expressly of that part of it by which an order of attachment of immovable property was held to be an assurance for valuable consideration, and by implication of the decision as a whole.

In 1916 the case of *Ng Boo Bee* v. *Khaw Joo Choe & Ors.*[5] was decided by Sproule J. and by the Court of Appeal. There the contest was between a judgment creditor who had registered an order of attachment, and persons to whom the debtor had conveyed the land, who had paid the purchase money and entered into possession but not prior to the registration of the order registered their conveyance. It was held that at the date of the seizure there was no interest of the debtor to be seized and that the Registration of Deeds Ordinance did not postpone the conveyance to the seizure. The courts considered *Fung's* case, *Eyre* v. *McDowell* and also the English case of *Jones* v. *Barker, ubi supra*. Though, on the facts there before the court, the decision was given against the judgment creditor, no reservation was expressed as to the correctness of *Fung's* case. Indeed Sproule J. said that the decision was "unquestionably right" and asked who could doubt that a registered writ of execution had priority over an earlier unregistered charge. No subsequent authority was cited to their Lordships in which any doubt was cast upon the decision in *Fung's* case and it was described as "still good law" in the judgment of the Federal Court.

Reliance was placed by the appellants upon the circumstance that when the Civil Procedure Code 1907 was, in 1934, replaced by Rules of the Supreme Court, the provisions contained in section 619 of the Code (quoted above) were not repeated, and nothing to a similar effect now appears in Order XLI. This it was said indicated a legislative intention to repudiate *Fung's* case, or at least to discard that portion of it which decided that a writ of attachment, or of seizure and sale, is an "assurance for valuable consideration". Their Lordships do not consider that such a conclusion ought to be drawn. The omission of what was a provision of substantive law, by that time well settled, from a set of new procedural rules appears to their Lordships perfectly natural, and some much more definite indication would be required to produce the result of, in effect, overruling a decision of the Court of Appeal, endorsed as in their Lordship's view it was, in *Ng Boo Bee's* case in 1916.

In their Lord ship's opinion *Fung's* case should be accepted as good law. As the preceding analysis has already made clear, that case also decided that an order of attachment or of seizure and sale is an "assurance for valuable consideration" within the meaning of section 7 (3) of the Registration of Deeds Ordinance, a point expressly endorsed (as made "very clear" by Collyer A.C.J.) by Ebden J. in *Ng Boo Bee's* case. Their Lordships consider that this conclusion ought also to be accepted as correct and find it unnecessary to attempt a fresh analysis of the nature of the consideration provided.

Their Lordships will, for these reasons, dismiss this appeal. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Parker, Garrett & Co.; Coward, Chance & Co.*

COOPERATIVE EXPORTVERENIGING "VECOFA" U.A. v. MAHA SYNDICATE

[O.C.J. (Ong Hock Sim J.) December 1, 1969]

[Penang — Civil Suit No. 264 of 1963]

Bills of Exhange — Acceptors — Liability — "D/A, on arrival of steamer" — Whether conditional "on arrival of steamer".

The defendants were acceptors of 3 bills of exchange amounting to $69,750.28, which the plaintiffs claim in this action with interest. The defendants admitted that they had signified acceptance of the bills but contended that each of the three documents having been drawn and expressed "At 60 days sight D/A, on arrival of steamer, *pay this first of exchange... to the order of* Amsterdamsche Bank N.V. Bijbank Rotterdam... for collection" the said documents were not an unconditional order to pay on demand or at a fixed determinable future time but were expressed to be payable on a contingency and were therefore not bills of exchange.